

JUL 14 1942

CHARLES ELMORE MOBLEY  
CLERK

*2D*  
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

---

No. 229

---

ALABAMA POWER COMPANY,

*Petitioner,*

*vs.*

FEDERAL POWER COMMISSION.

---

PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
DISTRICT OF COLUMBIA AND BRIEF IN SUPPORT  
THEREOF.

---

H. C. KILPATRICK,  
P. W. TURNER,  
WALTER BOULDIN,  
W. M. MOLONEY,  
*Counsel for Petitioner.*

MARTIN, TURNER & McWHORTER,  
*Of Counsel.*



## INDEX.

### SUBJECT INDEX.

	Page
A. Petition for writ of certiorari.....	1
Summary statement of matter involved.....	1
Jurisdiction.....	2
Statute involved.....	3
Summary statement of the case.....	3
Questions presented.....	6
Questions concerning propriety of the disallowance of items of claimed cost.....	7
Reasons relied on for allowance of the writ.....	9
B. Brief in support of petition for writ of certiorari.....	13
Opinions below.....	13
Jurisdiction.....	13
Statute involved.....	14
Statement of the case.....	14
Specification of errors to be urged.....	14
I. Respondent's order that disallowed items be charged to petitioner's earned surplus account is void as a denial of due process of law in that petitioner was afforded no notice or hearing on the question whether the amount of such disallowed cost items should be eliminated from accounts reflecting petitioner's investment in its utility properties nor does the record reveal any finding in support of such order.....	16
II. Respondent exceeded its jurisdiction in requiring charge of disallowed items to petitioner's earned surplus account.....	21

### TABLE OF CASES.

<i>Alabama Power Co. v. McNinch, et al.</i> , 94 F. (2d) 601 ..	3, 13
<i>American Telephone &amp; Telegraph Co. v. United States</i> , 299 U. S. 232, 240, 81 L. Ed. 142, 149 .....	9
<i>Atchison, Topeka &amp; Santa Fe Ry. Co. v. United States</i> , 295 U. S. 193, 201-203, 79 L. Ed. 1382 .....	10

	Page
<i>Elyton Land Co. v. Birmingham Warehouse &amp; Elevator Co.</i> , 92 Ala. 407, 425, 9 So. 129, 135.....	22
<i>Interstate Commerce Commission v. L. &amp; N. R. R. Co.</i> , 227 U. S. 88, 57 L. Ed. 431.....	20
<i>Louisville Gas &amp; Electric Co. v. Federal Power Commission</i> , No. 8564.....	11
<i>Mahler v. Eby</i> , 264 U. S. 32, 44-45, 68 L. Ed. 549.....	10, 20
<i>Morgan v. United States</i> , 298 U. S. 468, 80 L. Ed. 1288, 304 U. S. 1, 18, 25, 82 L. Ed. 1129, 1132, 1136.....	10
<i>Northwestern Electric Co. v. Federal Power Commission</i> , 125 F. (2d) 882.....	11
<i>Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio</i> , 301 U. S. 292, 81 L. Ed. 1093.....	20
<i>Panama Refining Co. v. Ryan</i> , 293 U. S. 388, 431-433, 79 L. Ed. 446.....	10, 20
<i>Shields v. Utah-Idaho Ry. Co.</i> , 305 U. S. 177, 182, 83 L. Ed. 111, 116.....	10, 20
<i>State, ex rel. White v. Citizens Light &amp; Power Co.</i> , 172 Ala. 232, 236, 55 So. 193, 194.....	22
<i>United States v. Baltimore &amp; Ohio R. R. Co.</i> , 293 U. S. 454, 462-465, 79 L. Ed. 587.....	10
<i>Wichita R. R. Co. v. Public Utilities Commission</i> , 260 U. S. 48, 58-59, 67 L. Ed. 124.....	10, 20

## STATUTES.

<i>Federal Water Power Act of 1920</i> , Section 201(a).....	21
<i>Section 240(a)</i> , Judicial Code, amended by Act of February 13, 1935 (28 U. S. C. A. 347).....	2, 13
<i>Section 313</i> , Federal Power Act, added by Act of August 26, 1935, c. 687, Title II, Section 213, 49 Stat. 860 (16 U. S. C. A. Sec. 825 L).....	2, 13, 14
<i>Federal Power Act</i> , 41 Stat. 1063, 46 Stat. 797, 49 Stat. 863 (16 U. S. C. A. 791a-825r).....	3, 14
<i>Section 301(a)</i> , Federal Power Act [16 U. S. C. A. 825(a)].	17
<i>Alabama Code 1940</i> , Title 48, Sections 41-46, 302-322.	22
<i>Alabama Code 1940</i> , Title 10, Section 26.....	22
16 U. S. C. A. 824(b).....	21
16 U. S. C. A. 824(c) (f).....	21

## PUBLIC DOCUMENTS.

Report No. 621, 74th Congress, 1st Session.....	22
---	----

SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1942

---

**No. 229**

---

ALABAMA POWER COMPANY,

*vs.*

*Petitioner,*

FEDERAL POWER COMMISSION.

---

**PETITION FOR WRIT OF CERTIORARI.**

---

*To the Honorable the Supreme Court of the United States:*

Your Petitioner, Alabama Power Company, respectfully says:

**1. Summary Statement of Matter Involved.**

This is a statutory proceeding for review of orders of the Federal Power Commission determining actual legitimate original cost of Petitioner's hydro electric project licensed under the Federal Water Power Act of 1920,<sup>1</sup> which require elimination from the stated investment on Petitioner's general books of account of amounts disallowed by the Respondent as actual legitimate original

---

<sup>1</sup> As amended, now cited as The Federal Power Act.

cost by requiring such amounts to be charged to Petitioner's earned surplus account.

Generally, the matters involved are (a) whether the Federal Power Commission may lawfully require a successor to a licensee to eliminate from its general investment accounts amounts disallowed as actual legitimate original cost of a licensed project without, Petitioner maintains, notice, hearing, inquiry or evidence as to whether Petitioner's general investment accounts reflect no more than true investment in assets of continuing value as distinguished from actual legitimate original cost; (b) whether the Federal Power Commission may lawfully require a successor to a licensee to eliminate from its general investment accounts amounts disallowed as actual legitimate original cost of a licensed project without a finding by the Commission that the amounts carried in such investment account exceed the true investment of such successor licensee in assets of continuing value; (c) the extent of the jurisdiction of the Federal Power Commission over the general investment accounts of Petitioner which are subject to the jurisdiction of and are being regulated by the Public Service Commission of Alabama; and (d) the validity of conclusions of law and the findings of fact upon which items claimed as project cost were disallowed.

### **Jurisdiction.**

Jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1935 (28 U. S. C. A. 347), and Section 313 of the Federal Power Act, added by the Act of August 26, 1935, c. 687, Title II, Section 213, 49 Stat. 860 (16 U. S. C. A., Section 825L). The first decree of the Court of Appeals (R. Vol. II, p. 1020) was entered September 27, 1937, the second decree of the Court of Appeals was

entered on March 30, 1942 (R. Vol. II, p. 893), and application for rehearing was denied April 29, 1942 (R. Vol. II, p. 910).

### **Statute Involved.**

The statute involved is the Federal Power Act, 41 Stat. 1063, 46 Stat. 797, 49 Stat. 863 (16 U. S. C. A., 791a-825r).

### **Summary Statement of the Case.**

The project is known as Mitchell Dam, Project No. 82, and is located on the Coosa River in the State of Alabama. Petitioner is the successor to the original licensee having acquired the licensed project and other unlicensed utility properties in a consolidation of three companies. Two hearings have been held before the Commission on the actual legitimate original cost of the project and the controversy has been twice before the United States Court of Appeals for the District of Columbia. On the first hearing, the Commission disallowed certain items of claimed cost and issued its opinion and order dated November 7, 1932, requiring Petitioner to set up accounts reflecting the actual legitimate original cost so determined (R. Vol. I, pp. 15, 18, 561). Suit to enjoin enforcement of such order as modified by order of December 19, 1932, was filed in the United States District Court for the District of Columbia in which the issues finally presented were whether the disallowed items constituted actual legitimate original cost as defined in the Federal Power Act. The District Court (R. Vol. II, p. 944) dismissed the bill on the merits. The Court of Appeals<sup>2</sup> reversed the case for further hearing before the Commission, holding that the Commission had erred with respect to disallowance of certain items of claimed cost while properly disallowing others. The second hearing was held by the Commission in 1939. In

---

<sup>2</sup> *Alabama Power Company v. McNinch, et al.*, 94 F. (2d) 601.

neither of the orders calling the hearings was there any statement that the Commission proposed to determine the validity of Petitioner's stated investment in its utility properties (R. Vol. I, pp. 153, 616), nor was any such issue tendered or testimony introduced with respect thereto by the Commission's staff or Petitioner during the course of either such hearing. Reference to the orders fixing the hearing will show that the hearing was limited to the subject of net investment, i.e., actual legitimate original cost, as of December 31, 1925, upon issues of fact presented by the Commission's preliminary accounting report and Petitioner's protest thereto. By opinion and order dated November 26, 1940, the Commission adjusted its previous determination of original cost. In such order, the Commission, in addition to requiring establishment of accounts reflecting such determination, required that the amount of the disallowed items (exclusive of one item) be charged to the earned surplus account of Petitioner, thus requiring that such amounts be entirely eliminated from the general investment accounts of Petitioner as well as from the project accounts reflecting the actual legitimate original cost of the project (R. Vol. I, pp. 19, 781).

On application for rehearing, Petitioner protested that the phase of the order requiring a reduction in Petitioner's investment accounts in the amounts disallowed as actual legitimate original cost had been made without affording Petitioner notice of or hearing upon the question whether amounts disallowed as original cost should be eliminated from Petitioner's general investment accounts; and Petitioner prayed for such a hearing (R. Vol. I, pp. 22, 27). The Commission denied the application and ordered Petitioner to show cause in writing under oath why its accounting requirements should not be made effective and submit to the Commission such accounting treatment as Petitioner might propose for disposition of disallowed items (R. Vol.

I, p. 28). Petitioner responded that the order should not be made effective because Petitioner had had no hearing upon that part of the order requiring reduction of its general investment accounts. With respect to such accounting treatment as might be proposed for the disallowed items, Petitioner responded that it proposed to institute court review of the Commission's order disallowing such items, that the decisions of the courts on such review would probably affect the proper accounting disposition of such items, and therefore, submitted that Petitioner could propose no authoritative accounting disposition in advance of such decisions. Petitioner also stated that it did not interpret the Commission's order as requiring answer based upon the hypothesis that the courts would affirm such disallowance, but, in effect, submitted itself to further instructions in that respect (R. Vol. I, p. 29, 39). No further instructions were given by Respondent. Such response was held insufficient and stay of the order was dissolved (R. Vol. I, p. 47). Petition for review was filed with the United States Court of Appeals for the District of Columbia and the order of the Commission was stayed on certain conditions pending the hearing of such petition (R. Vol. II, p. 863). On motion for such stay, Petitioner showed, that it was a successor to the original licensee; that it was a corporation created in 1927 (subsequent to the construction of the project) and had acquired the licensed project along with other unlicensed public utility properties in a consolidation of three corporations; and that the consideration for the whole of such properties acquired was equivalent in amount to the amount at which such properties were carried on the books of the constituent companies (R. Vol. II, p. 859).

Petitioner maintains that it is entitled to carry in its investment accounts the amount of the consideration so paid for its properties as a whole in the consolidation of

1927, whether or not the Commission's determination of actual legitimate original cost of the project to Petitioner's predecessor is correct, for the reason that such consideration reflects a true investment in assets of continuing value.

There was no evidence before Respondent with respect to such subsequent acquisition by Petitioner and no finding by Respondent as to what effect such acquisition should have upon Petitioner's investment accounts. No intimation was given Petitioner that any investment other than actual legitimate original cost was to be considered or affected by the proceeding.

Petitioner, therefore, further maintains that it had no hearing on the validity of its general investment accounts, because Respondent gave no notice that it intended to eliminate any amounts from such accounts, Respondent's notice and hearing being directed solely to determination of actual legitimate original cost. The Court of Appeals affirmed the order of the Commission on March 30, 1942, and Petitioner's application for rehearing and modification of mandate was denied April 29, 1942 (R. Vol. II, p. 910).

#### **Questions Presented.**

1. When a corporation acquires a completed licensed project, together with unlicensed utility properties, for a consideration equal to the recorded book value of such properties, may the Federal Power Commission lawfully require such corporation to write out of its general investment accounts an amount of such consideration equal to the amount thereafter disallowed by such Commission as actual legitimate original cost of the licensed project?
2. May the Federal Power Commission lawfully order the write-off described in question (1) above in a proceeding for the determination of actual legitimate original cost

only, and without notifying Petitioner that such action is proposed?

3. May the Federal Power Commission lawfully order the write-off described in question (1) above without a finding by the Commission that the amounts carried in such general investment accounts exceed true investment in assets of continuing value?

4. Does Respondent's order to show cause in writing under oath why Respondent's previously rendered order should not be enforced constitute the hearing provided for by Section 301(a) of the Federal Power Act and required by the due process clause of the Constitution?

5. Has the Federal Power Commission jurisdiction over the general accounts of an electric public utility and licensee which is also subject to comprehensive regulation, including regulation of its general accounts, by a duly constituted state public service commission?

#### **Questions Concerning Propriety of the Disallowance of Items of Claimed Cost.**

1. Is the amount of taxes paid on project lands more than three years prior to beginning of construction of project structures properly a part of the actual legitimate original cost of such project?

2. Is the interest on expenditures incurred more than three years prior to the beginning of construction of project structures properly a part of the actual legitimate original cost of such project?

3. Is the actual legitimate original cost of the lands and water rights acquired under the circumstances outlined at R. Vol. II, p. 948-50, 987-93, 1007-08, to be determined by

the value of the stock issued in the merger or consolidation there described?

4. In determining the value of particular lands and water rights, is it lawful to fix such value solely upon the basis of the cost of obtaining control of other lands and water rights which, in themselves, were insufficient to permit the comprehensive development of the licensed project as it now exists?

5. In determining the value of stock issued in the merger or consolidation described at R. Vol. II, p. 948-49, 988-90, by reference to the properties underlying such issue, may such value be lawfully fixed by reference solely to the consideration paid prior to the consolidation for control of certain of the properties involved which were in themselves insufficient for the contemplated development, or must effect be given to the value of the properties involved as a whole at the time of the consolidation?

6. Is a fee or profit, reasonable in amount, paid to an affiliated contractor corporation for the construction of a licensed project allowable as actual legitimate original cost?

7. When bonds of a purchaser are given for property, is the cost of such property measured by the principal amount of such bonds or the market value of such bonds?

8. Was a new corporation formed under the laws of Alabama in the merger and consolidation of 1913, referred to at R. Vol. II, p. 948-49, 988-90?

9. Was cost incurred in the merger or consolidation of 1913, referred to at R. Vol. II, p. 948-49, 988-90, regardless of whether a "new" corporation was formed under the laws of Alabama?

## Reasons Relied On for Allowance of the Writ.

### I.

The court below has held in effect that the Federal Power Commission may require elimination from the general investment accounts of a successor licensee of amounts disallowed by the Commission as actual legitimate original cost of a licensed project without regard to whether the recorded investment on the books of the successor licensee reflects no more than the true consideration paid for properties of continuing value by such successor corporation. Such holding does not give proper effect to *American Telephone & Telegraph Co. v. United States*, 299 U. S. 232, 240 (81 L. Ed. 142, 149). This Court in its opinion in that case recognized the difference between original cost and the investment of the accounting utility and that the investment of the accounting utility might exceed original cost. The order of the Commission in this proceeding affirmed by the court below fails to recognize any distinction between actual legitimate original cost to Petitioner's predecessor and the present investment of Petitioner in its utility properties as a whole and has, upon mere determination of the former, entered an order reducing the latter. This case, therefore, presents one aspect of a question of vital importance in public utility regulation, to-wit, whether the accounts of utilities shall reflect original cost to the person first devoting the properties to public use only or whether such accounts may reflect the effect of subsequent transactions affecting investment of the present owners in properties of continuing value.

### II.

The holding of the court below that notice of hearing, purportedly one to determine the actual legitimate original cost of a licensed project, gave Petitioner notice that it must reduce its stated investment by the amount disallowed as actual legitimate original cost of such project does not give

proper effect to *Morgan v. United States*, 298 U. S. 468 (80 L. Ed. 1288), 304 U. S. 1, 18, 25 (82 L. Ed. 1129, 1132, 1136).

### III.

The court below has in effect held that the Federal Power Commission may lawfully require a successor to a licensee to eliminate from its general investment accounts amounts disallowed as actual legitimate original cost of a licensed project without any finding by the Commission that the amount carried in such general investment accounts exceeds true investment in assets of continuing value. Such holding by the court below does not give proper effect to the decisions of this Court in *Wichita R. R. Co. v. Public Utilities Commission*, 260 U. S. 48, 58-59, 67 L. Ed. 124; *Mahler v. Eby*, 264 U. S. 32, 44-45, 68 L. Ed. 549; *Panama Refining Co. v. Ryan*, 293 U. S. 388, 431-433, 79 L. Ed. 446; *United States v. Baltimore & Ohio R. R. Co.*, 293 U. S. 454, 462-465, 79 L. Ed. 587; *Atchison, Topeka & Santa Fe Railway Co. v. United States*, 295 U. S. 193, 201-202, 79 L. Ed. 1382.

### IV.

The holding of the court below that Petitioner has foregone the opportunity to question the propriety of Respondent's order by reason of Petitioner's response to Respondent's order to show cause in writing under oath (R. Vol. I, p. 29) does not give proper effect to *Shields v. Utah-Idaho Ry. Co.*, 305 U. S. 177, 182 (83 L. Ed. 111, 116).

### V.

The court below has construed the Federal Power Act as conferring upon the Federal Power Commission jurisdiction to eliminate amounts from the general investment accounts of a licensee notwithstanding the fact that such accounts are subject to general regulation and supervision

by a duly constituted state agency (R. Vol. II, pp. 856, 857). To Petitioner and to licensees and public utilities generally such holding is of great immediate and future importance in that, as is now the case with Petitioner as a result of the order here involved, investment accounts of licensees and public utilities kept pursuant to state regulation may be inconsistent with those kept pursuant to orders of the Federal Power Commission, with consequent potential conflict between state and federal regulation, continuing impairment of efficiency in the conduct of the businesses of such licensees and utilities and confusion and uncertainty as to their legal rights and obligations. The question here involved has been decided adversely to Petitioner's contention by the Circuit Court of Appeals for the Ninth Circuit in the case of *Northwestern Electric Co. v. Federal Power Commission*, 125 F. (2d) 882, and by the Circuit Court of Appeals for the Sixth Circuit in the case of *Louisville Gas & Electric Co. v. Federal Power Commission*, No. 8564, decided June 29, 1942.

WHEREFORE, it is respectfully submitted that this petition should be granted.

ALABAMA POWER COMPANY.

WILLIAM M. MOLONEY,  
H. C. KILPATRICK,  
P. W. TURNER,  
WALTER BOULDIN,  
*Attorneys for Petitioner.*

MARTIN, TURNER & McWHORTER,  
600 North 18th Street,  
Birmingham, Alabama,  
*Of Counsel.*